In the

Supreme Court of the United States

No. 75-993

ALTON D. WHITT,

Petitioner,

VS.

ESTELLE MAE VAUTHIER

PETITION FOR CERTIORARI

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TABLE OF CASES CITED

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No.

ALTON D. WHITT,

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VS.

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PETITION FOR CERTIORARI

Alton D. Whitt, of age, and a resident of the State of Louisiana, petitions the Court to issue a writ of certiorari to review the actions of the Appellate Courts of the State of Louisiana in denying petitioner the constitutional guarantees reserved him under Amendments 5 and 14 of the Constitution of the United States and 28 U.S.C. 1257 (3).

(a) REFERENCE TO OFFICIAL REPORTS OF THE OPINION DELIVERED IN THE COURTS BELOW

This cause will be found reported as follows:

Whitt v. Vauthier, (CCA-4), 295 So. 2d 235 and *316 So. 2d 202;* writ refused *(La. Sup. Ct.) 320 So. 2d 558.*

(b) CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) DATE OF JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE TIME OF ENTRY

The date of the judgment or decree and its entry is as follows:

The Trial Court signed a judgment on October 25, 1974, rejecting petitioner's contention that Louisiana's alimony laws, as applicable following divorce, discriminated invidiously in favor of women and against men and further, ordering petitioner to pay back alimony as will be seen by reference to a copy of the said judgment annexed hereto and marked for identification EXHIBIT A.

On appeal by petitioner, the Court of Appeal, Fourth Circuit, State of Louisiana (an intermediate Appellate Court to which direct appeals are taken pursuant to Louisiana Constitution of 1921, Article 7, Section 29, as amended) on July 8, 1975, amended and affirmed the Trial Court's judgment essentially rejecting petitioner's demands. See copy of opinion and decree of Court of Appeal and dissenting and concurring opinions annexed hereto and marked EXHIBIT B. (see *316 So. 2d 202*)

In accordance with Louisiana appellate practice, petitioner filed a timely application for rehearing which was refused on August 6, 1975, and petitioner annexes a copy of the refusal by the Court of Appeal to grant a rehearing which is marked EXHIBIT C (see notation of refusal at *316 So. 2d 202*)

Petitioner then filed a petition in the Louisiana Supreme Court seeking its review of the actions of the Court of Appeal which petition was denied by the Louisiana Supreme Court on October 17, 1975, as will be seen by reference to a copy of the per curiam of that Court annexed hereto and EXHIBIT D (see *320 So. 2d 558*)

(ii) DATE OF ORDER RESPECTING A REHEARING AND DATE AND TERMS OF ORDER GRANTING AN EXTENSION OF TIME WITHIN WHICH TO PETITION FOR CERTIORARI

No rehearing has been granted and no extension of time within which to petition for certiorari has been granted.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION

Petitioner believes jurisdiction is conferred on this Court by 28 U.S.C. 1257 (3), in that the denial of review by the Louisiana Supreme Court in this cause on October 17, 1975, caused the opinion and decree of the Court of Appeal, Fourth Circuit, State of Louisiana of July 8, 1975, to become a final judgment or decree rendered by the highest Court of a state in which a decision may be had. Accordingly, such judgment or decree maybe reviewed by the Supreme Court of the United States by a writ of certiorari, ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .".

(c) QUESTIONS PRESENTED FOR REVIEW

(i) Does Article 160 of the Louisiana Civil Code of

1870 impose an impermissable and invidious sexual discrimination against petitioner and in favor of respondent in violation of Amendments 5 and 14 of the United States Constitution?

(ii) Does a state's Appellate Courts' rule of law to the effect that while awards of alimony may be made retroactive, reductions or terminations of alimony may not be made retroactive, discriminate invidiously and impermissably in violation of Amendments 5 and 14 of the U.S. Constitution.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES

(i) AMENDMENTS 5 AND 14, SECTION 1, OF THE U.S. CONSTITUTION:

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(ii) 28 U.S.C. 1257. STATE COURTS—APPEAL—CERTIORARI

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty of statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute or any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(iii) LOUISIANA CIVIL CODE ARTICLE 160

Art. 160. When the wife has not been at fault, and she has not sufficient means for her support, the Court may allow her, out of the property and earn-

ings of her husband, alimony which shall not exceed one-third of his income when:
1. The wife obtains a divorce;
2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or
3. The husband obtained a valied divorce from his wife in a court of another state or country which had no jurisdiction over her person.
This alimony shall be revoked it it becomes unnecessary, and terminates if the wife remarries. *(As amended by Acts 1964, NO. 48, §1.)*

(e) CONCISE STATEMENT OF THE CASE

For relator's "statement of the case, in this writ application, petitioner adopts the following factual rendition of Judge Schott of the Court of Appeal, Fourth Circuit:

> "This case is a sequel of *Whitt v. Vauthier*, 295 So. 2d 235 (La. Appl 4th Cir. 1974), writ refused 299 So. 2d 793. There the wife successfully appealed from a judgment finding her at fault and thus not entitled to alimony under LSA-C.C. Art. 160. In reversing, the Court rendered a judgment in favor of the divorced wife for alimony in the amount of $175 per month commencing November 13, 1972, the date of the divorce judgment. Our original opinion was handed down on February 7, 1974, and rehearing was denied on June 18, 1974. Following the refusal of the writ by the Supreme Court on September 13, 1974, the husband filed a motion to terminate alimony on the grounds that, while the case was pending on appeal the wife had obtained gainful em-

ployment which would have precluded her recovery of alimony, and that C.C. Art. 160 is unconstitutional because only a divorced husband is obliged to pay alimony under the article, thereby arbitrarily discriminating against male spouses, and thus depriving the husband of due process and equal protection of the law.

A counter motion was filed by the divorced wife seeking to make past due alimony executory in the amount of $4,025. based upon $175 per month from November 13, 1972, through September 13, 1974.

The trial judge rejected the husband's contention that C.C. Art. 160 is unconstitutional. Based upon evidence which showed that the divorced wife had been employed as a real estate salesman in March, 1973, and derived some income from this employment since that date, the trial judge retroactively reduced her alimony beginning January 13, 1974, to the sum of $110 per month. He made alimony executory in the amount of $175 per month from November 13, 1972, through December 13, 1973, thereby arriving at a total sum of $3,550. From this judgment the husband appealed, urging the unconstitutionality of the article and the wife answered the appeal, seeking an increase in the amount of executory alimony to the sum of $4,135.[1]"

The Court of Appeal amended the judgment of the Trail Court to increase the amount of the alimony it held to be past due and then in all other respects affirmed the lower court judgment. The amount of past due alimony

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[1]This figure is based on $175 per month from November 13, 1972, through September 13, 1974, and $110 for October 13, 1974. The husband's rule was filed on October 7, 1974, and trial was held on October 15.

was increased from $3,550 to $4,135. Upon timely application being made to the Supreme Court to rectify the error complained of, the Louisiana Supreme Court rejected the applications. The Court of Appeals opinion and decree of July 8, 1975, is now the law of the case and is therefore the action to be reviewed by the Supreme Court of the United States.

(f) STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

On October 7, 1974, petitioner filed a motion and rule nisi to terminate alimony on the constitutional grounds here urged as will be seen by reference to a copy of the said rule annexed hereto and marked EXHIBIT E.

(g) NO REVIEW OF A JUDGMENT OF A FEDERAL COURT IS HERE SOUGHT

(h) ARGUMENT FOR ALLOWANCE OF THE WRIT

That the Court of Appeal has erred in its opinion and decree of July 8, 1975, in failing to find *CC-Article 160* unconstitutional as violative of the Fourteenth Amendment of the U.S. Constitution is manifest. In its opinion, on the constitutional issue, the Court relied heavily upon the case of *Murphy v. Murphy, 206 S.E. 2d. 158*, and the denial of certiorari by the U.S. Supreme Court.

However, an examination of the per curiam of the U.S. Supreme Court gives small comfort to the Court of Appeal's opinion and decree of July 8, 1975. It is reported at *421* U.S. *929* and reads as follows:

> "April 21, 1975. Petition for writ of certiorari to the Supreme Court of Georgia denied. Mr. Justice Douglas took no part in the consideration or decision of this petition."

The U.S. Supreme Court has held a refusal to grant a writ application to be of no legal significance. The refusal of a writ application was held to be in no case an affirmance of the decree complained of. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251.*

The denial of a writ application imports no expression of opinion upon the merits of the case. *Atlantic Coast Line Railroad Co. v. Powe, 283 U.S. 401.*

Previous denials of certiorari do not foreclose the Supreme Court from granting appropriate relief. *Chessman v. Teets, 354 U.S. 156.*

The Court of Appeal also sought to bolster its opinion and decree of July 8, 1975, by analogizing the case of *Kahn v. Shevin, 416 U.S. 351*, in which a Florida statute giving widows a $500.00 exemption from property taxation was held to be constitutional even though the same benefit was not conferred on widowers.

The U.S. Supreme Court, has, in three cases, found discrimination based upon sex to be intolerable, namely, *Reed v. Reed, 404 U.S. 71; Frontiero v. Richardson, 411 U.S. 677; Weinberger v. Wiesenfeld, 420 U.S. 636.*

Kahn v. Shevin would seem to be inconsistent with the holdings in *Reed, Frontiero* and *Weinberger.* But we believe *Kahn* is distinguishable from the other cases in that in *Kahn* the state was not taking directly from the pocket of one person and placing the benefit directly into the pocket of another, but on the contrary, was merely

excusing a class of persons in the State of Florida from paying a very small tax.

In the case at bar the litigants are not the State and an individual; but the litigants are in individual and an individual. The confrontation is one for one.

Reed, Frontiero and *Weinberger* recognized that classifications, based upon sex, like classifications based upon race, alienage or national origin are inherently suspect.

Civil Code Article 160 makes a distinction between persons clearly based on sex, and is therefore legally impermissible when measured against constitutional standards.

ERROR OF COURT OF APPEAL AS REGARDS ANCIENT LAW

The Court of Appeal erroneously assumed that the Code Napoleon, adopted in France in 1803, was the law of Louisiana at that time and since.

Our research shows the ancestral law of Louisiana to have been the law of Spain.

On page 5 of the opinion and decree, the author of the majority opinion of the Court of Appeal of July 8, 1975, incorrectly interpreted the statements of Professor Yiannopoulos and incorrectly read *Cottin v. Cottin, 5 Mart. (o.s.) 93* and *Flowers v. Griffith, 6 Mart. (n.s.) 89.*

In *Cottin*, Judge Derbigny wrote:

> *"In Spain, however, the laws of which were, and have continued to be ours, where not re-repealed,*

> there exists a particular disposition by which it is further required, that the child, in order to be considered as naturally born, and not abortive, should live twenty-four hours. Is that law still in force among us, or is it virtually repealed by the expressions used in our civil code, in relation to this subject?" (emphasis supplied)

In *Flower*, decided in June Term, 1827, Judge Porter was considering a provision contained in the Civil Code of 1808 but omitted from the Code of 1825, and his reference to the "old code" was therefore to the Louisiana Code of 1803 and not Code Napoleon.

The following quotation from the opinion in *Flower* clearly demonstrates the error in the opinion in the case at bar.

> "The facts of the case show the property is held in common between the defendant and his sister. The only question, therefore, is, whether the judgment be correct in point of law.
>
> The *old code* contained a provision that the undivided share belonging to a coheir in a succession cannot be seized on an execution, but the creditors have a right to demand a partition of the estate between the coheirs, 490 art. 6.
>
> *It is contended that this article is repealed by the new code*, in which no such regulation is found. If it appeared that the legislature had made it a part of their amendments to that work that this article should be suppressed, then, perhaps, this argument would be correct.
>
> But nothing of that kind has been shown, and our own researchers have led us to the directly opposite conclusion. The jurists who were appointed to

alter and improve our *old code*, in their report to the legislature, proposed amendments of three kinds. The first, the insertion of new provisions; the second, modification of those already existing, and the third, the suppression of those articles which were incompatible with the changes they thought proper to recommend.

We have carefully examined this report, and not a word is said in it of the last title of the *old code*; it is neither proposed to be amended by new provisions, nor modified, nor suppressed." (emphasis supplied)

That the "common law" in existence in Louisiana which was the "prior law" referred to be Professor Yiannopoulas was Spanish Law is fortified by Judge Saunders. In "Saunders' Lectures on the Civil Code," (1925), Judge Saunders stated at page XXI:

"On November 3, 1762, by secret treaty, France ceded to Spain all of the Providence of Louisiana lying west of the Mississippi, together with the portion on the east bank surrounding and including the City of New Orleans.

In the fall of 1766 Ulloa arrived in New Orleans to take possession on behalf of the King of Spain, and, failing to exhibit his authority, was repatriated by the Superior Council in 1768.

On August 18, 1769, however, O'Reilly took formal and physical possession on behalf of the new sovereign, and by proclamation abolished the Superior Council, revoked all the French laws and introduced the laws of Spain. This derogation from the universal rule of international law was intended as a punishment for expelling the previous Spanish Governor. Bullard cites a copy of a royal order

under date of January 28, 1771, wherein the King of Spain declares that he had in 1765 appointed Don Antonio de Ulloa to proceed to the Province of Louisiana and to take possession as Governor, making, however, no innovation in its system of government, which was to be entirely independent of the laws and usages observed in his American dominions, but considering it as a distinct colony, having even no commerce with his said dominions, and to remain under the control of its own administration, council and other tribunals. That the inhabitants having rebelled in October, 1768, he had commissioned Don Alexandro O'Reilly to proceed thither and take formal possession, chastise the ringleaders, and to annex that province to the rest of his dominions. That his orders had been obeyed, the council abolished, and a Cabildo established in its place. Thereupon the King proceeds to ratify and confirm all that had been done, and directs that Louisiana shall be united, as to its spiritual concerns, to the Bishropic of the Havana, and governed in all else conformable to the laws of the Indies.

The existence of this decree was not known until long after the American cession, but the Supreme Court of Louisiana had in the meantime assumed that the act of O'Reilly in abrogating the French laws and substituting Spanish laws was the due exercise of power within his discretion, and accordingly the former ceased to apply.

Beard v. Poydras, 4 Martin (O.S.), 368 The Cabildo established by O'Reilly December 1, 1769, was a familiar form of local government in Spanish colonies. As operated here it was composed of ten persons and the Governor. Most of these persons held additional offices, obtained by purchase and as-

signable upon payment of a fixed stipend to the government.

In the Cabildo there were six hereditary Regidors, two Alcaldes, an Attorney-General and a Secretary. For legal matters there was no dearth of court officials. The two Alcaldes presided over the City of New Orleans and for five leagues adjacent thereto. The Alcalde Provincial had similar jurisdiction beyond the city. There was also the Court of the Intendant, handling matters of maritime origin and concerning the revenue, and the Governor's Court, which had general and supervisory jurisdiction and was the tribunal of last resort in the province.

The Ordinary Alcalde tried all civil and criminal cases where the parties were not entitled to military or ecclesiastical protection. Appeal lay thence to the Cabildo, which designated two Regidors to sit with the Judges who had decided the case; from these to the Capital-General; thence to the Royal Audience in St. Domingo and lastly to the Council of the Indies at Madrid was the road on which the cause might to go final judgment, if the parties were not exhausted by the cost and delay. The Spanish reorganization was thorough; one of its lasting changes was the creation of the office on Commandant, one for each district. He was both a civil and military officer, the collector of the revenue, the police magistrate, civil Judge, auctioneer, sheriff and notary public of his district. In short, he was a monopoly and the forefather of the Parish Judge of the following century.

O'Reilly's work was completed by an abridgment of the Spanish law and the establishment of a course of legal procedure, promulgated as guides for inhabitants until they could master the lan-

guage and the laws of Spain. Judge Derbigny and Judge Martin concur in the view that from this date the laws of that country were the sole guides of the tribunals in their discussions, and the latter concludes the change was so gradual it was unnoticed, both systems having great similarity, particularly in matters of succession, testimentary capacity and the like, due to the common origin.

The Spanish regime terminated on October 1, 1800, by the cession to France under the Treaty of St. Idelfonso. Actual delivery, however, was not accomplished until November 30, 1803, when Laussat, representing Napoleon, became for twenty days master of the situation. He has arrived in New Orleans in March, 1803, as Colonial Prefect, one of many new officials whom the French Emperor had designated to govern Louisiana under plans which contemplated a judiciary on French models, a revision of the laws, the creation of Civil and Criminal Codes, etc.

Laussat was disappointed almost at the start by news of the sale of the province to the United States. Besides, he thought he had been well treated by the colonial rulers, and his busy pen reflected his discolored humor of the moment. Unfortunately the historians of this period have relied on these caustic words overmuch, and the Spanish regime accordingly has been set in a pillory that should be pulled down.

While Laussat knew his power was only one of hours, he took fierce pleasure in bundling official Spain out of doors. On the day he assumed the reins he abolished the Cabildo and created a municipal government for New Orleans. He next organized a militia, composed of Americans and Creoles, and, in

short, made himself generally obnoxious to his late unwilling hosts. Time did not serve him to organize a judiciary, and his summary extinction of the Cabildo left the city without judges and added much to the preplexities of the incoming American administration.

On December 20, 1803, he surrendered the country to the United States—that is, all that portion from New Madrid to the Gulf. Wilkinson and Claiborne took possession under Presidential authority and in accordance with the Treaty of Paris of April 30, 1803, and by virtue of the provisions of the *act of Congress of October 31, 1803, authorizing the President to establish a temporary government for the same.*

This act, temporary in its nature, directed the President to appoint officers who should for the time being exercise all the functions and powers of the same officers of the existing government, which, of course, meant the Spanish officials and not the short-lived appointees of Colonial Prefect Laussat." (emphasis supplied)

Therefore, when the Court of Appeal in the case at bar stated at page 6 of the opinion,

> "Thus we know that alimony for the divorced husband was once available by virtue of a positive statute in the Code Napoleon, we know that the Legislature has by positive enactment provided for alimony for divorced wives, there has never been a positive Legislative enactment to the effect that divorced husbands cannot claim alimony, and in our research we find no case in which the husband has been denied or even applied for alimony after a divorce. We have concluded therefore that the Courts may . . . award alimony to a divorced husband."

the Court committed irreparable, irremediable, irretrievable, but not irreversible, error.

COURT OF APPEAL'S ERROR AS REGARDS RETROACTIVE ALIMONY

It is inconsistent that the Courts say they may award alimony to a wife retroactively, but also say they may not grant reductions retroactively.

In support of our second questions presented, we quote, in part, from the dissent of Judge Redmann, of the Court of Appeal, in the case at bar.

> "But the judgment appealed from should be reversed insofar as it awards as "arrearages" in alimony any sum for periods prior to the date of our first judgment, February 7, 1974. No executory judgment is possible C.C.P. art. 3945, except when "payment of alimony under a *judgment* is in *arrears*" (emphasis added)—a circumstance that could not occur, in this case, until after February 7, 1974. "When the [Civil] code [art. 3538] mentions arrearages of alimony, it undoubtedly has reference to an amount becoming due after the alimony has been fixed by the Court." Miller v. Miller, La. 1944, 20 So. 2d 419, 421. (See also Dubourg b. Dubourg, La. App. 1974, 291 So. 2d 441, where we rejected a wife's argument that permanent alimony is due from judicial demand rather than from date of judgment)[2]
>
> On the other hand, after February 7, 1974, the husband did know he as cast for alimony (though our judgment was not yet definitive.) If the wife was

[2] Although Falcon v. Falcon, La. 1955, 82 So. 2d 10, 11 awarded a permanent alimony increase retroactively to judicial demand (including an increase in the nevercontested *temporary* alimony), it did so because the husband "admitted liability in the amount sued for. Therefore we have no alternative . . ."

working or if other circumstances justified a reduction in alimony, he might reasonably have filed at that time a rule for reduction in the trial Court; Rakosky v. Rakosky, La. App. 1973, 275 So. 2d 421, writ refused 278 So. 2d 508. But prior to February 7, 1974—even if the view is erroneous that no prejudgment arrearage can occur—certainly the husband who had a judgment holding him not liable for alimony at all could not reasonably have been expected to file a rule for reduction from zero when the wife began to work. The job of judges is to do justice between litigants, to declare which has right on his side, and to provide any remedy that is due. Judges become sensitive to rights, to justice, because it is precisely their task to find right. Perhaps the peak of judicial right-finding is finding a constitutional right which invalidates even a "law" of the Legislature.

A curious anomaly it is, therefore, that right-sensitive judges can at times be insensitive to the wrong that they themselves do by their own "law". The horrifying example is the judge-made "law" that constitutional rights cannot be argued in an appellate court unless they were argued in the trial courts: this judge-made "law" becomes the highest law of the land, and reduces the Constitution to second-class law.

A similar self sanctification of judge made "law" is present here. Judges earlier ordained that past-due alimony payments cannot be *reduced* retroactively (they are "vested") no matter how dire the circumstances. This Court nevertheless blithely *imposed* alimony retroactively on the first appeal here, and now we create for the first time a rule that refuses retroactive reduction of retroactive alimony. This new judge-made "law" relegates com-

mon fairness to a second-class principal in our system. It is little consolation that our entire Constitution is similarly second-rate law according to some judicial theorists."

WHEREFORE, petitioner prays that a writ of certiorari issue in due course as provided by law and by the rules of the Court.

FLOYD J. REED, J.D.
Attorney for Petitioner
Ground Floor-Executive Tower
3500 North Causeway Boulevard
Metairie, Louisiana 70002

In the
Supreme Court of the United States

No.

ALTON D. WHITT,

Petitioner,

VS.

ESTELLE MAE VAUTHIER

CERTIFICATE OF SERVICE PURSUANT TO RULE 33

STATE OF LOUISIANA
PARISH OF ORLEANS

I, Floyd J. Reed, Attorney for Petitioner, Alton D. Whitt, duly admitted to practice before the Bar of the Supreme Court of the United States, swear that a copy of the petition for Writ of Certiorari of Alton D. Whitt, has been served on the parties hereto by U.S. Mail, postage prepaid, on the___day of January, 1976, as follows:

Steven K. Faulkner, Jr.
Attorney at Law
930 One Shell Square
New Orleans, Louisiana
70139

Hon. William J. Guste, Jr.
Attorney-General
State of Louisiana
P.O. Box 44005
Baton Rouge, Louisiana
70804

FLOYD J. REED, J.D.

SWORN TO AND SUBSCRIBED BEFORE ME, this_____day of January, 1976.

NOTARY PUBLIC

APPENDIX A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 504-741, DIVISION "H," DOCKET 5

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

JUDGMENT ON RULE

The rule to terminate alimony herein filed on October 7, 1974, by Alton D. Whitt, and the rule to fix alimony in arrears herein filed on October 15, 1974, by Estelle Mae Vauthier Whitt, came on this day for hearing.

PRESENT: FLOYD J. REED,
attorney for plaintiff.
STEVEN K. FAULKNER, JR.,
attorney for defendant.

When, after hearing the pleadings, evidence and argument of counsel, and for the reasons orally assigned:

IT IS ORDERED that the rule to terminate alimony on constitutional grounds be and it is hereby dismissed.

IT IS FURTHER ORDERED that there be executory judgment herein in favor of Estelle Mae Vauthier, and against Alton D. Whitt, in the full sum of $3,550.00, for

alimony in arrears through October 13, 1974, and beginning November 13, 1974, alimony will be due in the sum of $110.00 per month.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT ON OCTOBER 25th, 1974.

/s/Oliver P. Carriere
JUDGE

APPENDIX B

NO. 6845, COURT OF APPEAL

FOURTH CIRCUIT, STATE OF LOUISIANA

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 504-741. HONORABLE OLIVER P. CARRIERE, JUDGE.

PATRICK M. SCHOTT
JUDGE

REDMANN, J., DISSENTS IN PART WITH WRITTEN REASONS
GULOTTA, J., DISSENTS WITH WRITTEN REASONS TO FOLLOW
STOULIG, J., CONCURS IN RESULT WITH WRITTEN REASONS

(Court composed of Judges William V. Redmann, James C. Gulotta, Edward J. Stoulig, Patrick M. Schott and Ernest N. Morial)

REED, REED & D'ANTONIO
(Floyd J. Reed),
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Attorneys for Defendant-Appellee

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL FOR
STATE OF LOUISIANA,
WARREN E. MOULEDOUX,
FIRST ASSISTANT ATTORNEY
GENERAL (Stephen J. Caire),
Attorneys for
State Attorney General's Office

July 8, 1975 AMENDED AND AFFIRMED

This case is a sequel of *Whitt v. Vauthier*, 295 So.2d 235 (La. App. 4th Cir. 1974), writ refused 299 So.2d 793. There the wife successfully appealed from a judgment finding her at fault and thus not entitled to alimony under LSA-C.C. Art. 160. In reversing, this Court rendered a judgment in favor of the divorced wife for alimony in the amount of $175 per month commencing November 13, 1972, the date of the divorce judgment. Our original opinion was handed down on February 7, 1974, and rehearing was denied on June 18, 1974. Following the refusal of the writ by the Supreme Court on September 13, 1974, the husband filed a motion to terminate alimony on the grounds that, while the case was pending on appeal the wife had obtained gainful em-

ployment which would have precluded her recovery of alimony, and that C.C. Art. 160 is unconstitutional because only a divorced husband is obliged to pay alimony under the article, thereby arbitrarily discriminating against male spouses, and thus depriving the husband of due process and equal protection of the law.

A counter motion was filed by the divorced wife seeking to make past due alimony executory in the amount of $4,025 based upon $175 per month from November 13, 1972, through September 13, 1974.

The trial judge rejected the husband's contention that C.C. Art. 160 is unconstitutional. Based upon evidence which showed that the divorced wife had become employed as a real estate salesman in March, 1973, and derived some income from this employment since that date, the trial judge retroactively reduced her alimony beginning January 13, 1974, to the sum of $110 per month. He made alimony executory in the amount of $175 per month from November 13, 1972, through December 13, 1973, thereby arriving at a total sum of $3,550. From this judgment the husband has appealed, urging the unconstitutionality of the article and the wife has answered the appeal, seeking an increase in the amount of executory alimony to the sum of $4,135.[1]

With respect to the divorced husband's attack on the constitutionality of the statute, we have the benefit of a recent decision in *Murphy v. Murphy*, 232 Ga. 352,

[1]This figure is based on $175 per month from November 13, 1972, through September 13, 1974, and $110 for October 13, 1974. The husband's rule was filed on October 7, 1974, and trial was held on October 15.

206 S.E.2d 458 (1974), certiorari denied by the United States Supreme Court, U.S., 95 S.Ct. 1656. The reliance of the husband on *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L. Ed.2d 225 (1971) and *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1974, 36 L. Ed.2d 583 (1972), is the same as that placed on these cases by the appellee in the *Murphy* case. We agree with the rationale of the Georgia Supreme Court in analogizing the issue here to that disposed of by the Supreme Court of the United States in *Kahn* v. *Shevin*, U.S. 94 S. Ct. 1734, 40 L.Ed2d 189 (1974), in which a Florida statute giving widows a $500 exemption from property taxation was held to be constitutional even though the same benefit was not conferred on widowers. Likewise, we find the instant case distinguishable from *Weinberger v. Wiesenfeld*, 73-1892 on the docket of the Supreme Court of the United States which struck down 42 U.S. C. § 402(G) of the Social Security Act as unconstitutional. Aside from the fact that the Supreme Court's denial of a writ in the *Murphy* case came after their opinion in the *Weinberger* case, indicating that the high Court recognizes a distinction, we find that the special provisions afforded to divorced wives by C.C. Art. 160 can be justified or rationalized as were the special provisions for the homestead exemption in Florida in *Kahn v. Shevin*, supra, although these considerations were not applicable to *Weinberger* as they were not to *Frontiero*. We therefore conclude that C. C. Art. 160 is not inconsistent with the Constitution of the United States as most recently interpreted by the Supreme Court of the United States.

Although the issue was not specifically raised by the husband we have also considered whether C. C. Art. 160

is consistent with Art. 1 § 3 of the Louisiana Constitution of 1974, which provides as follows:

> "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."

The pertinent part of Art. 160 provides as follows:

> "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when: . . ."

We note at the outset that the instant case raises the constitutional validity of this statute from an oblique point of view. We have here a needy wife who therefore qualifies for alimony under the article, a husband who has the "property and earnings" out of which alimony can be paid, and he complains that the statute is unconstitutional because it places an obligation upon male spouses but no express like obligation upon female spouses. It seems that the question would be more effectively and reasonably directed if this were a case where a husband had shown that he had not sufficient means for his support and was seeking alimony from the property and earnings of a wife. In the passage of Art. 160 the legislature recognizes an obligation to remedy need in the historically typical case of the wife who has not sufficient means for her support, and its only shortcoming may be in its failure to recognize a similar obligation to the need of a husband. Thus, we may have a discrimination by omission, but this discrimination would not seem to mandate a declaration of unconstitutionality as to the

remedy afforded to the needy wife, even if such were arbitrary, capricious or unreasonable. However, we have resolved that the divorced husband's attack on the constitutionality of the article is without merit for another reason.

His argument is based on the theory that the existence of Art. 160 causes discrimination against needy husbands in that there is no remedy available to them as is provided to needy wives by the article. The weakness of the argument is that it begs the question whether there is a similar remedy available to needy husbands in the first instance. We do not find this to be the case. In reviewing the history of Art. 160, we find that it made its appearance in the Civil Code of 1870 after being omitted from the Codes of 1808 and 1825. By an act of the Legislature in 1827 the article in substantially the same form as it now exists was adopted along with provisions for the grounds for divorce found in Art. 139 and other divorce related articles. The act of 1827 was substantially reenacted by Act 307 of 1855 and then was made a part of the 1870 Code. On the other hand, Art. 301 of the Code Napoleon of 1804 in effect provided Art. 160 type alimony for either spouse who was in need after divorce, and when the Civil Code of 1808 was adopted this provision was omitted along with other Code Napoleon divorce related articles. In his discussion of historical, political and legal background of the codification of the law in the Civil Codes of Louisiana, Professor A. N. Yiannopoulos in "Louisiana Civil Law System" states that the Civil Code of 1808 did not repeal all prior laws but only those which were "contrary to the dispositions" or "irreconcilable with them." Cited is *Cottin v. Cottin*, 5

Mart. (O.S.) 93 (La. 1817) in which it was held that the ancient laws "must be considered as untouched, whether the alternations and amendments, introduced in the digest, do not reach them." When the Code of 1825 was adopted it was intended that it be "an all inclusive piece of legislation, intended to break definitively with the past," but in *Flowers v. Griffith*, 6 Mart. (N.S.) 89 (La. 1827) it was held that the provisions of the old Code continued to be in force unless expressly modified, suppressed or superseded by the new provision.

When the Legislature saw fit to provide for divorce in 1827 and for the remedy to the needy divorced wife it was responding to conditions and customs which prevailed at that time. It seems to us that there was no intention on the part of the Legislature to foreclose against needy husbands by the passage of that act, but in that day and time the problem of the needy husband was simply not envisaged by the Legislature. The relative positions of men and women in that society were such that the case of the needy husband seeking alimony from his wife was so rare, and perhaps would have been so bizarre, that the Legislature did not provide a statutory remedy for that situation. Conditions were much the same in 1855 when the Act of 1827 was re-enacted, and in 1870 when the present Civil Code was adopted. Thus, we know that alimony for the divorced husband was once available by virtue of a positive statute in the Code Napoleon, we know that the Legislature has by positive enactment provided for alimony for divorced wives, there has never been a positive legislative statement to the effect that divorced husbands cannot claim alimony, and in our research of the jurisprudence we find no case

where the husband has been denied or has even applied for alimony after a divorce. We have concluded therefore that the courts may, in the appropriate case and consistent with sound Civilian principles award alimony to a divorced husband, and therefore the existence of Art. 160 which codifies the right of the divorced wife in this connection is not unconstitutional because it neglects to codify a similar right to divorced husbands. Not only do we reject the assumption that divorced husbands do not have a similar remedy but we find support for the proposition that they do. Accordingly, we find no basis to declare Art. 160 unconstitutional.

There is merit to the wife's answer to the appeal. This case came to the trial court on a rule to make past due alimony executory pursuant to LSA-C.C. Art. 3945. That article in prescribing that after trial of the motion "The Court shall render judgment for the amount of past due alimony" does not leave any discretion with the Court as to whether or not a judgment is to be given once there is proof that payments are in arrears. *Allen v. Allen*, 136 So.2d 168 (La. App. 4th Cir. 1962). Perhaps the best recent discussion of the procedural device sought to be implemented by the wife, in this case, is found in *Simon v. Calvert*, 289 So.2d 567 (La. App. 3rd Cir. 1975):

> "The only remedy available to a father to relieve himself of the obligation of paying child support imposed by a judgment is by proceeding to have the judgment amended, suspended, or terminated. Sampognaro v. Sampognaro, 222 La. 597, 63 So.2d 11 (1953); Rodriguez v. Rodriguez, 245 So.2d 765 (La. App. 4 Cir. 1971); Hebert v. Hebert, 159 So.2d 537 (La. App. 3 Cir. 1964). Courts cannot consider

equity for the purpose of nullifying or reducing accumulated alimony, which is a vested property right, until the judgment is altered or amended by subsequent judgment or is terminated by operation of law. LSA-C.C.P. art. 3945; Pisciotto v. Crucia, 224 La. 862, 71 So.2d 226 (1954); Elchinger v. Elchinger, 181 So.2d 297 (La. App. 4 Cir. 1965). Courts have also disallowed attempts at reduction of past due alimony and child support instigated by judgment debtors based on their inability to pay. Snow v. Snow, 188 La. 660, 177 So.793 (1937); Williams v. Williams, 211 La. 939, 31 So.2d 170 (1947). This further demonstrates the courts' reluctance to allow equity to interfere with collection of past due support payments pursuant to enforceable final judgments."

Notwithstanding the principle announced above to the effect that equity cannot be considered for the purpose of reducing accumulated alimony in oral arguments appellant has urged that we exercise our power to grant equitable relief pursuant to C.C. P. Art. 2164 and provide the husband with some relief as the trial judge attempted to do. The husband's position is that he had won his case in the trial court in November, 1972, and had no reason to be concerned about the wife's being gainfully employed until the opinion of this Court was handed down in the last case between these parties in February, 1974, when for the first time the husband was cast in judgment for alimony in favor of his divorced wife. He argues that his motion to terminate alimony was timely, coming within a month after the Supreme Court refused the writ which he sought to reverse our opinion in that last case. While we sympathize with this position, we cannot approve of the trial judge's reduction of alimony

from $175 to $110, effective January 13, 1974. This, in effect, changed a final judgment of this Court given tacit approval by the Supreme Court and took away from the divorced wife a property right in the form of a judgment for alimony in the amount of $175 per month. The trial court's action cannot be reconciled with the authorities cited in *Simon v. Calvert*, supra.

We think it significant that although the opinion in the last case between these parties was handed down in February, 1974, a rehearing was not denied until June, 1974. Nothing precluded the husband from then bringing to this Court's attention the fact that his former wife was employed during that period and had he done so this Court may have remanded the case to the trial court for the taking of evidence and an appropriate award based on the circumstances then prevailing. Instead, our judgment became final and was thereafter immune to any amendment by the trial court. Accordingly, that portion of the judgment which made past due alimony executory in the amount of $3,550 for the period from November 13, 1972, through October 13, 1974, as amended so the past due alimony for that period is made executory in the amount of $4,135, based upon 23 months at $175 and $110 payable on October 13, 1974.

No appeal has been taken from the trial judge's award of $110 per month beginning October 13, 1974, and that portion of the judgment will not be disturbed.

Accordingly, the judgment appealed from is affirmed insofar as the Constitutional objection to LSA-C.C. Art. 160 by Alton D. Whitt was rejected, and insofar as alimony was payable to Estelle Mae Vauthier,

divorced wife of Alton D. Whitt, by him was reduced to $110 per month, beginning October 13, 1974. But the judgment in favor of Estelle Mae Vauthier and against Alton D. Whitt in the sum of $3,550 for alimony in arrears is amended, so that there is judgment in her favor and against Alton D. Whitt in the amount of $4,135.

AMENDED AND AFFIRMED

NO. 6845

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

STOULIG, J., CONCURRING

I concur in the result.

The judgment of this court awarding the wife alimony of $175 per month became final and dispositive of the issue upon the refusal of the Supreme Court to grant writs. Thereafter, the unpaid alimony accruing under this judgment became a vested property right and was not subject to a retrospective modification by a subsequent judgment of the trial court. LSA-C.C.P. art. 3945.

As stated in the case of Rodriguez v. Rodriguez, 245 So.2d 765 (La. App. 4th Cir. 1971), the only remedy available to Mr. Whitt to modify the award of alimony to his divorced wife is by way of a rule seeking to reduce, suspend, or terminate, the effect of which cannot pre-

date its filing. The retroactive limitation of the effect of any judgment adversely affecting an award of alimony to the date of the filing of the rule for this purpose is necessary in order to preserve the vested property right character of accrued unpaid alimony.

NO. 6845

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

REDMANN, J., DISSENTING IN PART

I subscribe to that part of the majority opinion which, with clear reasoning, recognizes the impermissible discrimination of a law which would oblige the able ex-spouse to assist the needy ex-spouse, only if the able spouse were of the male sex. I also endorse the reasoning that Louisiana law does not thus discriminate against male ex-spouses.

But the judgment appealed from should be reversed insofar as it awards as "arrearage" in alimony any sum for periods prior to the date of our first judgment, February 7, 1974. No executory judgment is possible, C.C.P. art. 3945, except when "payment of alimony under a *judgment* is in *arrears*" (emphasis added)—a circumstance that could not occur, in this case, until after February 7, 1974. "When the [Civil] Code [art. 3538] mentions arrearages of alimony, it undoubtedly

has reference to an amount becoming due after the alimony has been fixed by the court." Miller v. Miller, La. 1944, 20 So.2d 419, 421. (See also Dubourg v. Dubourg, La.App. 1974, 291 So.2d 441, where we rejected a wife's argument that permanent alimony is due from judicial demand rather than from date of judgment).[1]

On the other hand, after February 7, 1974 the husband did know he was cast for alimony (though our judgment was not yet definitive). If the wife was working or if other circumstances justified a reduction in alimony, he might reasonably have filed at that time a rule for reduction in the trial court; Rakosky v. Rakosky, La.App. 1973, 275 So.2d 421, writ refused 278 So. 2d 508. But prior to February 7, 1974—even if the view is erroneous that no prejudgment arrearage can occur —certainly the husband who had a judgment holding him not liable for alimony at all could not reasonably have been expected to file a rule for reduction from zero when the wife began to work.

The job of judges is to do justice between litigants, to declare which has right on his side, and to provide any remedy that is due. Judges become sensitive to rights, to justice, because it is precisely their task to find right. Perhaps the peak of judicial right-finding is finding a constitutional right which invalidates even a "law" of the Legislature.

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[1]Although Falcon v. Falcon, La. 1955, 82 So. 2d 10, 11, awarded a permanent alimony increase retroactively to judicial demand (including an increase in the never-contested *temporary* alimony), it did so because the husband "admitted liability in the amount sued for. Therefore we have no alternative. . . ."

A curious anomaly it is, therefore, that right-sensitive judges can at times be insensitive to the wrong that they themselves do by their own "law". The horrifying example is the judge-made "law" that constitutional rights cannot be argued in an appellate court unless they were argued in the trial court: this judge-made "law" becomes the highest law of the land, and reduces the Constitution to second-class law.

A similar self-sanctification of judge-made "law" is present here. Judges earlier ordained that past-due alimony payments cannot be *reduced* retroactively (they are "vested") no matter how dire the circumstances. This court nevertheless blithely *imposed* alimony retroactively on the first appeal here, and now we create for the first time a rule that refuses retroactive reduction of retroactive alimony. This new judge-made "law" relegates common fairness to a second-class principle in our system. It is little consolation that our entire Constitution is similarly second-rate law according to some judicial theorists.

NO. 6845

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

GULOTTA, J., DISSENTING

I have no quarrel with the rationale employed by the majority in reaching a conclusion that LSA-R.C.C.

art. 160 is not unconstitutional. I do question, however, whether the instant case is the proper vehicle for a consideration of that question. The constitutional question of a husband's right to claim alimony is properly raised in a case where the husband seeks alimony and is denied relief. It is not properly raised in a case (as in the instant one) where the wife is seeking alimony. Accordingly, I am of the opinion that the constitutional question is not properly before us and not properly passed on.

I disagree with the result reached by the majority which amends and increases the amount of the accumulated alimony. The trial judge properly retroactively reduced the alimony payments from $175.00 to $110.00 per month effective January 13, 1974.

The majority finds fault with the trial court's granting of a reduction in alimony from January, 1974 to October 13, 1974 when the rule to reduce was filed. The effect of the majority opinion is to place the responsibility upon the husband to seek a reduction of the alimony decree of the Court of Appeal (rendered February 7, 1974, rehearing denied, June 18, 1974, writs refused, September 13, 1974) when the judgment had not become final until such time as the writs were denied by the Supreme Court. See LSA-C.C.P. art. 2167. Prior to rendition of our decree, the husband was under no order to pay alimony. On October 13, 1974, a rule for reduction was filed within a relatively short period of time from the date the Supreme Court denied writs. A rule for reduction filed prior to the finality of the decree (September, 1974) would have been met with an exception of prematurity.

Accordingly, I dissent from that part of the decree which denies a reduction in alimony payments from January of 1974 to October, 1974. I would affirm the judgment of the trial court.

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

Clerk's Office, New Orleans, August 6, 1975

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

ALTON D. WHITT v. ESTELLE MAE VAUTHIER No. 6845

Very truly yours,

Marjorie R. Cambre, Clerk

APPENDIX D

Supreme Court of Louisiana

NEW ORLEANS, 70112

October 17, 1975

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

In re: Alton D. Whitt applying for certiorari or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ refused.

On the facts found by the Court of Appeal, the result is correct.

/s/JWS
/s/FWS
/s/JAD
/s/WFM
/s/JEB

CALOGERO, J., dissents.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, October 17, 1975

/s/Phil Trice
Deputy Clerk

APPENDIX E

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 504-741, DIVISION "H", DOCKET #5

ALTON D. WHITT

VS.

ESTELLE MAE VAUTHIER, HIS WIFE

Filed: October 7, 1974 /s/A. "Pat" Brennan
Deputy Clerk

MOTION TO TERMINATE ALIMONY

On motion of Alton D. Whitt, plaintiff in the above captioned cause, through undersigned counsel, and on suggesting to the court:

1.

That his alimony payments were terminated by the court on October 31, 1972.

2.

That defendant obtained a suspensive appeal of the judgment of divorce and termination of alimony and in due course secured a reversal of this court's order which would have had the effect, apparently, of re-instating the support award of the court.

3.

That the defendant, Estelle Mae Vauthier, obtained gainful employment which would have precluded her recovery of any alimony whatsoever regardless of the circumstances of the case.

4.

That the said Estelle Mae Vauthier concealed the fact that she had obtained this employment from mover herein, otherwise mover would have filed a more timely motion to terminate the alimony based upon the fact that she is gainfully employed.

5.

That accordingly, the court should order the alimony fixed in this cause in favor of Estelle Mae Vauthier, terminated as of the date she first commenced gainful employment.

6.

Alternatively, the court should terminate the alimony in its entirety for the reason that any award of alimony made to the defendant herein without said law being the reciprocal is such an invidious discrimination so as to contravene the Fifth and Fourteenth Amendments of the United States Constitution relative to due process and equal protection of the laws.

IT IS ORDERED that Estelle Mae Vauthier appear in court on Friday, the 25 day of October, 1974, and show cause why:

1. Alimony heretofore set in her favor should not be discontinued effective the date she first commenced

gainful employment following the date of the judgment of divorce in this cause;

2. And alternatively, why the court should not decree all alimony terminated in favor of the defendant on the grounds that any alimony award made in favor of the defendant creates an invidious distinction between the plaintiff and the defendant so as to contravene and violate the provisions of the Fifth and Fourteenth Amendments of the United States Constitution.

New Orleans, Louisiana, October 7th, 1974.

/s/Oliver P. Carriere
JUDGE

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3500 North Causeway Boulevard
Ground Floor—Executive Towers
Metairie, Louisiana 70002
Telephone: 837-1096

FLOYD J. REED,
Trial Attorney

Serve defendant, through her attorney, Steven K. Faulkner, Jr., Esquire, 930 One Shell Square, New Orleans, Louisiana, 70139.

C-4597